Del Rey Tortilleria, Inc. *and* Local 76, International Ladies Garment Workers Union, AFL–CIO. Case 13–CA–25033

March 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On December 7, 1988, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions, a supporting brief, and a brief in answer to the General Counsel's exceptions; the General Counsel filed exceptions, a supporting brief, and a brief in answer to the Respondent's exceptions; and the Charging Party filed a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Del Rey Tortilleria, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge concluded, at fn. 3 of her decision, that the Respondent was not liable for remedial relief due discriminatees Felix Hernandez and Roberto Marcos because they were not at the backpay hearing and were thus unavailable for examination. The record shows that the General Counsel did not oppose the Respondent's motion at the hearing to dismiss the backpay specification as to Hernandez and Marcos. Accordingly, we find no merit to the General Counsel's exception that Hernandez and Marcos should not be denied remedial relief. In doing so, we find it unnecessary to consider whether Hernandez or Marcos would otherwise have been entitled to remedial relief.

Sheryl Sternberg, Esq., for the General Counsel.
Irving M. Geslewitz, Esq. (Adams, Fox, Adelstein & Rosen), of Chicago, Illinois, for the Respondent.
William R. Widmer III, Esq. (Carmell, Charone, Widmer & Mathews, Ltd.), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. On July 18, 1986, the National Labor Relations Board (the Board) issued a Decision and Order approving a settlement stipulation entered into on November 8, 1985, by Del Rey Tortilleria, Inc. (the Respondent), Local 76, International Ladies Garment Workers Union, AFL–CIO (the Union), and the General Counsel of the Board. Thereafter, on September 23, 1986, the United States Court of Appeals for the Seventh Circuit entered judgment enforcing in full the Board's Order. The settlement stipulation ordered Respondent to offer reinstatement and make whole employees Roberto Marcos, Felix Hernandez, Bernardo Bravo, and Gorgonio Hernandez for losses due to their termination, provided that any controversy regarding such offers or remedies including entitlement to backpay, would be determined at a formal backpay proceeding before the Board. A controversy having arisen over the employees' entitlement to reinstatement and backpay and the amount of backpay due, the Board's Regional Director for Region 13 issued a backpay specification and notice of hearing on March 11, 1987, as amended on April 22. The Respondent filed timely answers on March 27 and April 27, 1987, respectively, denying, in substance, that the alleged discriminatees were entitled to reinstatement or backpay since they were not lawfully present and employed in the United States.

At a hearing held before me in Chicago, Illinois, on May 13, 14, and 15, 1987, the parties were afforded full opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The record remained open for an extended time period, during which the Respondent investigated the matter of Bravo's interim earnings. The parties also filed various posttrial motions and appeals to the Board. Thereafter, briefs were submitted which have been carefully considered.

On the record before me,[1] including my observation of the witnesses' demeanor, I make the following

FINDINGS OF FACT

The Issues

1. Before proceeding to the merits of this case, a procedural question must be resolved: whether Respondent is bound by the settlement stipulation providing for a formal hearing on remedial matters.

2. The substantive question is whether Bernardo Bravo and Gorgonio Hernandez/Nicolas Paredez[2] are entitled to relief, although at the time of their discharge until they applied for legalized status, they were present in the United States as undocumented aliens.[3]

[1] The transcript of the hearing in this matter contains numerous and blatant errors. However, since the parties have not filed motions to correct and since the mistakes do not appear to alter the substantive meaning of the text or seriously affect the reader's ability to make sense of it, the transcript shall remain uncorrected.

[2] At the trial, Nicolas Paredez admitted that he had used the name Gorgonio Hernandez (his matronymic) while in Respondent's employ. The parties stipulated that Paredez and Hernandez are one and the same person. Hereafter, he will be referred to by his proper name, Nicolas Paredez.

[3] Although included in the settlement stipulation and the backpay specification, neither Felix Hernandez nor Roberto Marcos appeared at the instant hearing. Since they were not available for examination, the Respondent may not be held liable for remedial relief otherwise due them.

I. RESPONDENT IS BOUND BY THE SETTLEMENT STIPULATION

At the hearing in this matter, the Respondent moved to dismiss the backpay specification on the ground that by failing to disclose material facts, Region 13's personnel had wrongfully procured Respondent's assent to that part of the settlement stipulation which provides for a formal backpay proceeding. At the hearing, following a proffer from the Respondent and argument by all parties, I denied the motion, but invited counsel to further address the issue in their posthearing briefs.

Having reviewed the parties' positions as set forth at the hearing and in their briefs, and after taking into account the documents which were offered into evidence,[4] I reaffirm my denial of Respondent's motion for the reasons set forth below.

A. *Background*

In a case preceding the present one, the Board issued a decision finding that Del Rey had violated the Act by wrongfully terminating three other employees and ordered reinstatement and backpay. 272 NLRB 1106 (1984). Thereafter, the Respondent and the Region exchanged letters regarding the Respondent's remedial obligations to those employees. Briefly stated, the Respondent advised the Region that it had reason to believe that the discriminatees were illegal aliens. Therefore, Respondent argued, they were not entitled to reinstatement or backpay since they were not lawfully available for work as required by the Supreme Court's decision in *Sure-Tan, Inc. v. NLRB*.[5] In several replies sent in late 1984 and early 1985, the Region differed with Respondent over the meaning of *Sure-Tan*, maintaining that remedies were denied to the discriminatees in that case because they had left the country, and not because they were undocumented aliens. In April 1985, while the earlier *Del Rey* case was on appeal to the United States Court of Appeals for the Seventh Circuit, the complaint in the instant case issued.

In June 1985, prior to the date set for hearing, the Region initiated settlement discussions. At this point, the Respondent renewed its argument that like the employees in the first *Del Rey* case, the alleged discriminatees in the present matter might be illegal aliens, and if so, would not be entitled to relief. These settlement discussions languished until early October 1985, when the Region gave Respondent a draft settlement stipulation containing, inter alia, the following language at paragraph 8(2)(a):

> Offer reinstatement to . . . Bernardo Bravo and Gorgonio Hernandez and . . . make them whole for loss of wages and benefits due to their terminations: any controversy regarding offers of reinstatement . . . or make whole remedies including entitlement to back pay shall be determined by proceeding to a formal backpay proceeding before the National Labor Relations Board.

In November 1985, representatives of the Union, the Respondent, and the General Counsel signed the stipulation containing the above-quoted provision.[6] As noted previously, the Board approved the settlement stipulation in a Decision and Order dated July 18, 1986; the court of appeals judgment followed on September 23, 1986.

In July and October 1985, before the stipulation was signed, the General Counsel issued memoranda OM 85–57 and OM 85–89 respectively, which instructed the Board's Regional officers to withhold remedial relief to discriminatees who were unable to show lawful presence in the United States during the backpay period. At the time the settlement stipulation was executed, Region 13's officials admittedly knew of these memoranda, but Respondent did not.

In April 1986, the court of appeals enforced the Board's Order granting reinstatement and backpay to the discriminatees in the earlier *Del Rey* case. Having learned of the General Counsel's memoranda by that time, the Respondent asked the Region to follow those guidelines. As a consequence, the discriminatees in that case were denied reinstatement and backpay. Respondent then insisted that the Region follow the same procedure in the instant case. After seeking instructions from the General Counsel's division of advice, the Region refused, taking the position that the OM's 85–87 and 85–89 guidelines did not apply where the stipulation provided for a formal hearing to resolve any controversy over entitlement to reinstatement and backpay.

The Respondent sent a lengthy letter with attachments to the Associate General Counsel suggesting that the office of advice had not been fully apprised of the relevant facts attending execution of the settlement stipulation and requested that the office reconsider its determination that the backpay proceeding go forward. (R. Exh. 5.) In a reply of December 30, 1986, the Associate General Counsel denied Respondent's request, reasoning that:

> there is nothing in the OM memoranda that prohibits a Region from securing a stipulation embodying the agreement of the parties. In the instant case, the Charging Party . . . had sought a stipulation containing a provision for a hearing concerning reinstatement and backpay issues. These Regional personnel, seeking an all-party settlement, conveyed such a proposal to you. The proposal was accepted by you, and an all-party settlement was achieved. In these circumstances, I see no impropriety on the Region's part, and I see no reason to depart from the terms of the stipulation. (G.C. Exh. 3.)

B. *Discussion*

Respondent contends in its brief, as it did at the hearing, that the Region was obligated to inform it of the General Counsel's 1985 guidelines and that the failure to do so was tantamount to a material misrepresentation. The essence of Respondent's argument is this: if the Region had disclosed the memos, Respondent would not have agreed to language

[4] At the hearing, counsels' statements of position on this issue were received as proffers; documents which related to and supported those proffers were marked, but not admitted into evidence. On reconsidering this matter, I conclude that the documents, whose authenticity is undisputed, are relevant to an understanding of the parties' contentions and, therefore, should be a part of the record in this case. Accordingly, Respondent's Exhibits (R. Exh.) 5, 6, and 7; General Counsel's Exhibits (G.C. Exh.) 3 and 4; and the Charging Party's Exhibit (C.P. Exh.) 1 are admitted into evidence.

[5] 467 U.S. 883 (1984).

[6] The court of appeals decision enforcing the Board's Order in the earlier *Del Rey* case issued on April 2, 1986. 787 F.2d 1118 (7th Cir.).

calling for a formal backpay proceeding. Instead, it ''would have insisted that the settlement stipulation simply provide that the General Counsel's applicable guidelines be followed, and the Region would have been bound to accede. This, in turn, would have resulted in a determination at the compliance level that Bravo and Paredez were not entitled to reinstatement and backpay by virtue of their illegal presence in the country and the case would have been administratively closed.'' (R. Br. 6.) Because Respondent's argument is based on unfounded assumptions, it leads to a false conclusion.

An analysis of this controversy starts with the premise that a settlement is in the best interests of all parties. Clearly, the Board and the General Counsel view settlement as a desirable alternative to litigation; it is an effective way to expedite cases and conserve energies for matters that must be resolved by other strategies. The Respondent also must have looked favorably on a settlement as the most economic way to dispose of a complaint with numerous allegations. Surely, the Respondent had to assess carefully the risks of trial having recently lost one case before the Board on a complaint with similar allegations to those currently pending.

Respondent apparently overlooks the fact that the Region was interested in achieving a settlement to which *three* parties could agree. Respondent was in no position to dictate terms unilaterally. The record clearly shows that without the controverted language contained in paragraph 8(a)(2), the Charging Party would not have acquiesed to the settlement stipulation. Without the Charging Party's consent, the matter would have been tried.

Respondent also errs in contending that if it had refused to acquiesce to the objectionable phrase in paragraph 8(a)(2), the Region would have been compelled to follow the memoranda's guidelines and dismiss the case. As the Board's agent, the Region has a duty to vindicate the public interest. Therefore, even if specific remedies were not available for the several employees involved, it is highly unlikely that the Region would have dismissed a case such as this. The General Counsel frequently prosecutes cases where the only remedy sought to effectuate the purposes of the Act is the posting of a notice to employees. Here, where the Board previously found Respondent had engaged in similar discriminatory conduct, and where the current complaint contained numerous allegations of unlawful threats, interrogation, surveillance, and promises of benefits, in addition to the wrongful discharges, the Region was not likely to forego prosecution in the event the case did not settle.

Settlement negotiations involve a process of give and take. Here, the Respondent obviously obtained certain advantages by settling, not the least of which was the avoidance of a trial. In addition, Respondent received other concessions including dissolution of a U.S. District Court injunction pending against it and agreement that signing the stipulation was not an admission of guilt. Further, by proposing that any controversy over reinstatement and backpay be submitted to an administrative forum, the Region in no way restricted Respondent's right to mount a defense based on its construction of *Sure-Tan*. Respondent clearly wanted a settlement and benefitted from this one. On becoming aware of the General Counsel's compliance memoranda months before the Board and the court of appeals decisions in this case, the Respondent could have attempted to withdraw from the entire settlement on the same grounds that it now alleged undermines its effectiveness.[7] It did not do so and even now seeks to escape from only one clause of a stipulation whose other provisions were beneficial to it. In short, if Respondent had known of the memoranda, it could have refrained from signing the settlement stipulation and proceeded to trial. If the provision for a backpay hearing was not included in the stipulation, the Charging Party would have opted for a trial. In either case, the outcome would have been the same. Therefore, the Region's failure to advise Respondent of the memoranda's existence, whether inadvertent or purposeful, was immaterial, since disclosure would not have led to dismissal, as the Respondent asserts. In these circumstances, the Region's decision to propose a formal hearing was a reasonable way to reconcile the opposing interests of the two adversaries and a valid exercise of its discretion. Accordingly, I conclude that Respondent was fairly bound by the settlement stipulation which provided for a hearing to resolve any controversy regarding reinstatement and backpay.[8]

II. THE EMPLOYEES UNDOCUMENTED STATUS DOES NOT BAR RELIEF

A. *The Facts*

At the backpay hearing, the parties stipulated that Bravo and Paredez were present in the United States as undocumented aliens. Both Paredez and Bravo testified that they resided in this country continuously and without interruption for more than 5 years, and intended to apply for legalization under the terms of the Immigration Reform and Control Act of 1986 (IRCA).[9]

Approximately 5 months after his discharge from Del Rey, Paredez found employment with another company and has worked there consistently through the date of the present hearing. Bravo testified that although he regularly sought work on an average of three times a week since Respondent fired him, he has been unsuccessful in finding steady employment and reported interim earnings of just under $1000. He did not claim that this meager sum sustained him; rather, he stated that he was supported by family and friends.

In accordance with their commitment to seek legalization, Paredez and Bravo each applied for amnesty under IRCA. On January 26, 1988, Paredez received a temporary resident card; a work authorization card was issued to Bravo on July 21, 1988.[10]

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[7] OM 85–57 and OM 85–89, the memoranda which the Respondent claims should have governed the Region's compliance actions in this case, were reprinted at 120 LRR 342, on December 23, 1985, approximately 1-1/2 after the settlement stipulation was signed, but more than 7 months before the Board approved the settlement. They subsequently were withdrawn.

[8] The parties also stipulated that the settlement constituted ''the entire agreement between the parties. . . . there being no other agreement verbal or otherwise which varies, alters or otherwise adds to it.'' G.C. Exh. 2 at 6. Incidentally, the settlement contains no severance provision preserving the validity of the whole if one or more provisions should be deemed invalid.

[9] Pub. L. 99–603, 1986 U.S. Code Cong. & Admin. News (100 Stat. 3358), signed into law on November 6, 1986.

[10] The parties stipulated to the authenticity of these documents and agreed that copies could be offered instead of the originals. Accordingly, the Paredez' TRS card and Bravo's work permit are admitted into evidence as G.C. Exhs. 12 and 13, respectively.

IRCA provides that an undocumented alien had to take the following steps to obtain naturalization: first, prior to September 1, 1988, he had to file an application for adjustment of status. If the applicant made a prima facie showing of eligibility for temporary resident status during an interview with the Immigration and Naturalization Service (INS), he was granted an employment au-

B. *Discussion*

The General Counsel and the Charging Party assert that neither the Supreme Court's decision in *Sure-Tan* nor IRCA bar Paredez' and Bravo's entitlement to the Board's traditional remedies. Respondent contends, to the contrary, that Paredez' and Bravo's admissions that they were undocumented aliens proves conclusively that they were not legally present in the United States from 1982 until they applied for amnesty under IRCA. Consequently, according to Respondent's reading of *Sure-Tan*, they were ineligible for backpay or reinstatement during that period of time. Based on an analysis of Board and court precedents, together with a review of IRCA's requirements, I conclude, in agreement with the General Counsel and the Union, that Paredez and Bravo were and continue to be eligible for reinstatement and backpay, notwithstanding their undocumented status.

For many years, the Board held that undocumented alien workers were ''employees'' within the compass of Section 2(3) of the Act, entitled to the full range of the Act's protections.[11] Thus, the Board regularly awarded backpay and reinstatement to undocumented aliens who were discriminated against for engaging in concerted protected activity in violation of Section 8(a)(3).[12]

The Board seemed to alter this position based on its construction of the Supreme Court's decision in *Sure-Tan*. The discriminatees in that case were undocumented aliens who were reported by their employer to the INS after they voted for union representation. During an INS investigation, the discriminatees acknowledged that they were Mexican citizens living and working illegally in the United States and, pursuant to an INS grant, voluntarily departed the country in lieu of deportation. 467 U.S. at 886–887.

The Board found that Sure-Tan had violated Section 8(a)(3) of the Act by constructively discharging its employees in retaliation for their union activities and ordered ''the conventional remedy of reinstatement with backpay.'' *Sure-Tan I*, 234 NLRB 1187 (1978). Thereafter, the Seventh Circuit Court of Appeals modified the Board's Order to provide each discriminatee with a minimum backpay award which would be paid even if the workers were absent from the country for the duration of their backpay periods. *NLRB v. Sure-Tan, Inc*., 672 F.2d 592, 606 (7th Cir. 1982).

The Supreme Court affirmed the Board's conclusion that the NLRB is applicable to undocumented employees. 467 U.S. at 894. However, the Court reversed the Seventh Circuit's minimum backpay award as speculative since there was no ''evidence . . . as to the period of time these particular employees might have continued working before apprehension by the INS and without affording petitioners any opportunity to provide mitigating evidence.'' Id. at 901 fn. 11. The Supreme Court instructed the Board that reinstatement must be conditioned on legal readmittance to the United States, and in computing backpay on remand,

> the employees must be deemed ''unavailable'' for work (and the accrual of backpay thereafter tolled) during any period when they were not lawfully entitled to be present and employed in the United States. [Id. at 903.]

Because the issue was not before it, the Court did not expressly address the question here in dispute of whether workers who remain in this country and have not been subject to deportation proceedings are ineligible for backpay and reinstatement by virtue of their undocumented status. However, the Board subsequently interpreted the above-quoted language broadly, taking the position in several cases that even alien workers who remained in the United States (and thus, literally available for work) would not be entitled to an award of backpay and reinstatement unless they presented proof of their lawful immigration status to a Board compliance officer. See *Ethnic Produce*, 275 NLRB 205 (1985); *Felbro, Inc*., 274 NLRB 1268, 1269 (1985); enf. granted in part and denied in relevant part, sub nom. *Ladies Garment Workers Local 512 v. NLRB*, 795 F.2d 705 (9th Cir. 1986).[13] See also *Impact Industries*, 285 NLRB 5 (1987).

In *Felbro*, the court of appeals rejected the Board's construction of *Sure-Tan*. Reversing the Board's conditional remedial order, the court observed that ''the Board's order places upon the NLRB compliance officer the responsibility for determining whether the discriminatee was 'lawfully entitled to be present and employed in the United States' during the backpay period. . . . [Yet], ''[a]t oral argument, counsel for the NLRB candidly admitted that the the Board 'does not quite know' how a compliance officer would handle the immigration law questions sure to arise at the compliance stage of a conditional remedial order similar to that issued here.'' Id. at 720.

In other words, as the General Counsel points out in her brief, neither in *Felbro* nor in any other case has the Board decided what sort of evidence must be adduced to prove lawful entitlement to be present and employed in the United States, or which party bears the burden of producing that evidence. The General Counsel further submits, with the support of the Charging Party, that in view of the complexity of the immigration laws, only a final determination by the INS that Paredez and Bravo are not entitled to be present and employed in this country should suffice to extinguish their right to backpay and reinstatement in the present case. She further contends that the Respondent, the party seeking to avoid the Board's traditional remedies, should bear that burden. I find merit in these contentions.

The court of appeals characterized this nation's immigration laws and regulations as exceedingly complex, bearing a ''striking resemblance . . . to King Minos' labyrinth in ancient Crete.'' 795 F.2d at 720–722. Even if an undocumented worker should fall within one of the 52 categories of people who may not enter the United States, the court enumerated some of the ''many circumstances which prevent a 'deportable alien' from actual deportation under INS standards.'' Id. at 721. Consequently the Ninth Circuit concluded, as did the Supreme Court in *Plyler v. Doe*, 457 U.S. 202, 226 (1982),

thorization card. 8 CFR § 274 a(2)(n)(1). Next, if the INS investigation uncovered no negative evidence, the applicant's status was adjusted to that of a lawful temporary resident and he received a TRS identification card. 8 CFR § 210. Further processing leads to permanent resident status, followed by the final step, naturalized citizenship.

[11] See *Duke City Lumber Co*., 251 NLRB 53, 54 fn. 4 (1980).

[12] See *Apollo Tire Co*., 236 NLRB 1627 (1978), enfd. 694 F.2d 1180 (9th Cir. 1979); *Amay's Bakery & Noodle Co*., 227 NLRB 214 (1976).

[13] The Ninth Circuit's decision in *Felbro*, issued shortly before IRCA became law, rejected the Board's approach by distinguishing *Sure-Tan*, interpreting that case to permit backpay for undocumented workers as long as they remained in this country (and available for work) and not subjects of deportation proceedings. 795 F.2d at 719.

''There is no assurance that a [Person] subject to deportation will ever be deported.'' Id.

Neither an NLRB administrative law judge nor a Regional compliance officer possesses the expertise or experience to find her way through this statutory thicket and determine independently the status of undocumented aliens under the immigration code. I stated repeatedly throughout the instant hearing that it was inappropriate to impose on the judge determinations which properly are allotted to immigration officers. I adhere to that view with even greater conviction now. The INS and not the NLRB has the sole and exclusive authority to determine admissibility to and deportability from this country. See 8 U.S.C. §§ 1226(a) and 1252(b). Therefore, to conclude that Bravo and Paredez are eligible for reinstatement and backpay until the INS issues a final deportation order, furthers national labor policy while accommodating the purposes of the INA. See *Sure-Tan*, 467 U.S. at 902–903, citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

Just before passage of IRCA, the Ninth Circuit stated in *Felbro* that a backpay award would not conflict with the INA's objectives since that statute was only peripherally concerned with the employment of undocumented workers. At that time, the INA did not prohibit an employer from hiring an undocumented alien nor prohibit an undocumented alien from accepting employment after entering the country illegally. 795 F.2d at 719.

This situation was altered with the enactment of IRCA on November 6, 1986. IRCA provides, inter alia, for the adjustment to lawful temporary resident status (TRS) of certain individuals who have maintained continuous unlawful residence in the United States since January 1, 1982. The application period for adjustment to TRS began on May 5, 1987, and ended on May 5, 1988. IRCA now makes the employment of unauthorized aliens unlawful and imposes sanctions on employers who knowingly hire or continue to employ them. Pub. L. 99–603, § 101. It could be argued that ordering reinstatement for an undocumented alien might conflict with IRCA objectives and expose an employer to criminal liability for violating the command of that statute. See Pub. L. 99–603. Such an argument is not persuasive here for a number of reasons.

First, the penalty provisions of IRCA do not apply to ''grandfathered'' employees; i.e., employees hired on or before November 6, 1986. The regulations enacted pursuant to IRCA provide that the ''grandfather'' requirement of continuing employment is met where the employee is reinstated after a wrongful discharge or pursuant to a settlement. 8 CFR § 274a.2(b)(v) and (iii)(E),(G). In the instant case, Bravo and Paredez were hired by Del Rey prior to November 6, 1986, and absent their involuntary discharges, it must be presumed that they would have remained in Respondent's employ. Hence, Respondent could have reinstated them as grandfathered employees without fear of offending IRCA.

Although the grandfather provision immunized Respondent from liability under IRCA, this did not necessarily mean that the two employees in question were exempt from seeking legalization under IRCA. In this regard, Bravo and Paredez both testified at the hearing that they believed they were eligible for amnesty and intended to apply for legalization under IRCA. If these statements were presented to the Respondent in affidavit form, they would have satisfied IRCA's requirements for a declaration of intent, thereby conferring on Paradez and Bravo the status of intending citizens entitled to work for the Respondent until September 1, 1987, even without INS authorization.[14] Consistent with his declaration, each man applied for legalization and received authorization from INS to remain and work in the United States.

Respondent contends that the documents which Bravo and Paredez obtained from INS operate prospectively and do not legalize their presence here prior to the dates on which they were issued. However, as discussed above, the Ninth Circuit observed in the pre-IRCA *Felbro* decision that INS was only marginally concerned with the employment status of undocumented workers and *Sure-Tan* did not alter well-settled Board law that illegal aliens who had not been deported (like Paredez and Bravo) were eligible for reinstatement and backpay. 572 F.2d at 719, 723–724. At all times since IRCA was enacted, Bravo and Paredez have continued to be eligible for reinstatement and backpay either as grandfathered employees, intending citizens or applicants for legalization. In sum, the passage of IRCA does not affect the discriminatees entitlement to the Board's traditional remedies throughout the backpay period.

Even if Paredez and Bravo had not taken the preliminary steps requisite to adjusting their status, the legislative history of IRCA indicates that Congress did not intend to curtail the Board's power to remedy unfair labor practices committed against undocumented workers. Thus, H.R. Conf. Rep. No. 1,000, 99th Cong., 2d Sess. 58 (1986), states:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards . . . to remedy unfair labor practices committed against undocument employees . . . for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term ''employee'' in Section 2(3) . . . or of the rights and protections stated in Sections 7 and 8 of the Act.

This language suggests that the Board has wide latitude to pursue objectives which effectuate the NLRA, and at the same time accommodate the IRCA, by ordering reinstatement and backpay, provided that the INS has not determined that the discriminatee is deportable.

Clearly, Respondent, as the party challenging the employees' entitlement to reinstatement and backpay, should bear the burden of proving their ineligibility by producing evidence that they are subject to an INS deportation order.[15]

[14] See *Handbook for Employers*, U.S Department of Justice at 6. See also Tr. 367–370.

[15] See *Consolidated Freightways*, 290 NLRB 771 (1988) (transgressor should bear the burden of the consequences stemming from its illegal acts); *Fixtures Mfg. Corp.*, 251 NLRB 778 (1980), enfd. in part, remanded in part, 669 F.2d 547 (8th Cir. 1982) (burden of proving facts that would render discriminatee unfit for reinstatement is on the party seeking to bar reinstatement).

Respondent insists that there was no finding that Del Rey discriminated against Bravo or Paredez. However, by settling Respondent avoided trial, and instead, agreed to an order providing for reinstatement and backpay, barring any controversy. Thus, notwithstanding the nonadmissions clause in the stipulation, the net effect of the settlement is to treat Bravo and Paredez as if they were discriminatees.

Respondent has not produced such documentation. Accordingly, it has failed to show that Paredez and Bravo are not entitled to the Board's traditional remedies owed to wrongfully terminated employees.

III. THE AMOUNT OF BACKPAY DUE

A. *The Second Amended Backpay Specification*

Prior to the hearing in this matter, the General Counsel served a subpoena on the Respondent seeking certain records needed to calculate precisely, the amount of backpay allegedly owed to the terminated employees. Thereafter, the Respondent moved to revoke the subpoena. This dispute was resolved at the hearing by agreement between the parties that the Respondent would permit a Board compliance officer to review the necessary payroll records at its facility. Based on this review, the General Counsel filed an amended backpay specification on June 4, 1987. Specifically, the amended specification alleges that the proper method to calculate the wages owed to Paredes and Bravo is based on the actual earnings of a representative employee who remained on Respondent's payroll throughout the backpay period. The Respondent's answer of June 24 denied the allegations on two grounds: first, that because the discriminatees were not lawfully present in the United States, their backpay period never commenced, and second, that the General Counsel was foreclosed from again amending the backpay specification since Respondent had admitted the method of calculating gross backpay proposed in a previous specification.

Respondent's first argument regarding the discriminatees' unlawful presence in this country, was considered above and found to be without merit. Respondent's second argument is equally unpersuasive. At the outset of the hearing in this matter, the General Counsel stated without dispute that she had been denied access to Respondent's records and therefore was unable to prepare a backpay specification which accurately reflected the wages owed the discriminatees. Accordingly, I granted the General Counsel leave to file an amendment to the amended backpay specification after she had an opportunity to review the relevant records. Accordingly, I find that the backpay specification here in dispute was properly amended pursuant to Section 102.57 of the Board's Rules and Regulations.[16] The amended pleading of June 4, 1988, shall be marked as General Counsel's Exhibit I(h); Respondent's answer to it shall be marked as General Counsel's Exhibit I(i), and both shall be entered into the formal record of this proceeding.

B. *The Question of Bravo's Interim Earnings*

The Respondent did not contest the method selected by the General Counsel to compute backpay allegedly owed the two discriminatees and also admitted the accuracy of their interim earnings, to the extent that it was reported. In addition, Respondent offered reinstatement to Paredez and Bravo in September 1988.[17] However, Respondent submits that Bravo's testimony was so lacking in candor that it must be assumed that he either failed to diligently seek interim employment or concealed interim earnings he did acquire. Consequently, Respondent argues that Bravo has forfeited entitlement to any backpay. Thus, the final question to be resolved here is is whether Bravo willfully incurred a loss of interim earnings, as Respondent contends.

C. *The Applicable Principles*

Under longstanding Board rules governing backpay proceedings the General Counsel is required to show the gross amounts the discharged employees would have received in the absence of the employer's unlawful conduct. Once that showing is made, the burden shifts to the employer to establish facts which diminish its liability. *Mastro Plastics Corp*., 136 NLRB 1342, 1347 (1962), enfd. 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). Toward that end, the Respondent may adduce facts proving that the discriminatee willfully incurred a loss of earnings by failing to make a good-faith effort to obtain or retain interim employment. See *Rutter-Rex Mfg. Co*., 158 NLRB 1414, 1447 (1966). However, it is ''well settled that the reasonableness of a discriminatee's efforts to find a job . . . need not comport with the highest standard of diligence. . . . Rather, it is sufficient that the discriminatee make a good faith effort.'' *Lundy Packing Co*., 286 NLRB 141 (1987). Although the ingredients of good faith may vary with the circumstances of each case, ''the discriminatee's skills, experience, qualifications, age and labor conditions in the area are factors to be considered.'' Id. Moreover, a backpay claimant's lack of success in finding work need not indicate bad faith for there is no guarantee that even the most willing and diligent applicant will be hired. Id. In the final analysis, to satisfy its burden of proving that a discriminatee willfully avoided interim employment, the Respondent must show ''a clearly unjustifiable refusal to take desirable new employment.'' Id. Any uncertainty in the evidence is to be resolved against the respondent as the wrongdoer. *Southern Household Products Co*., 203 NLRB 881 (1973). After careful consideration, I conclude that the Respondent has failed to meet the rigorous burden imposed by the principles outlined above.

The record shows that Bravo had only a shadowy recollection of the names of companies where he allegedly sought employment. Although he testified that he searched for work three times a week, he recalled the names of no more than two or three businesses. However, he did attempt to supplement his account with other details. He described the product manufactured at one company, gave the location of another, and the name of a supervisor at a former workplace where he applied for reemployment. In addition, he volunteered that he had applied for jobs at restaurants in the area and had travelled to Michigan with friends on some three to five occasions and to Florida in search of work on ranches[18] and other places. When pressed on cross-examination to give additional details, he stated that his job search was in Benton Harbor, Michigan. However, he was unable to provide an address, explaining that while there, he resided in a trailer. He

[16] Sec. 102.57 provides that ''After the opening of the hearing, the specification and the answer thereto may be amended upon leave of the administrative law judge . . . good cause therefor appearing.''

[17] On August 24, 1988, Respondent sent a telegram to Paredez offering reinstatement if he reported to work by September 6. Respondent also offered reinstatement to Bravo (via the Union) if he reported to work by September 27. During a telephone conference call among the parties on September 13, 1988, and in their briefs, neither the General Counsel nor the Charging Party stated that these offers were not bona fide. Accordingly, I conclude that the backpay period ended on the dates that Paredez and Bravo received Respondent's reinstatement offers.

[18] I assume that Bravo used the word ''ranches'' as a synonym for farms.

also testified that a fire at his residence several years ago had destroyed his personal records which he had not yet replaced.

Respondent asserts that Bravo's testimony was evasive; his inability to recall simply incredible. Respondent's incredulity falls short of proof needed to demonstrate willful loss of earnings for it is well established that an employee is not disqualified from receiving backpay merely because of uncertain memory or poor recordkeeping. See *Hickory's Best, Inc*., 267 NLRB 1274, 1376 (1983).[19]

Moreover, given Bravo's background, inferences other than those of deceit are readily available to explain his lack of success on the job market. Bravo was Mexican by birth; since he testified in Spanish with the assistance of a translator, I infer he was not proficient in English. At best, he had a ninth grade education and apparently lacked skills that would equip him for anything more than menial labor. After 1 year's employment with the Respondent, he was earning only the minimum wage. Respondent was skeptical of Bravo's claim that he lost all of his identification in a fire that swept his residence. Since Bravo gave the exact address of the house, it would have been an easy matter for Respondent to have impeached him if an investigation revealed that the disaster was fabricated. Since Respondent did not raise this matter again, Bravo's testimony regarding this event stands uncontroverted. Bravo's losses in the fire surely added to his handicaps in securing work. Especially after the passage of IRCA in September 1986, potential employers may not have looked favorably on an undocumented alien who lacked identification.[20]

Respondent also complains that Bravo abused the Board's processes by failing to supply interim employment information until shortly before the hearing. In response to this complaint, I granted Respondent an extension of time after the hearing concluded to conduct an investigation of Bravo's interim earnings, if any. In fact, Respondent had more than ample opportunity to verify any of the facts that emerged as a consequence of Bravo's testimony. With but one exception to be discussed below, Respondent did not attempt to reopen the record to introduce affirmative evidence that appropriate job opportunities were available to Bravo or that he rejected interim employment.

Further, contrary to Respondent's contention, Bravo did cooperate in signing a release authorizing the United States Internal Revenue Service to search its files and release any W–2 and 1099 forms which might be found.[21] Since interim earnings would appear on the W–2 form, this was sufficient for Respondent's purposes. After a comprehensive search was conducted of national tax records in March 1988, an agent of the IRS advised me and the parties that no records existed for Bravo. The absence of such information tends to support Bravo's testimony that he had no stable employment and to disprove Respondent's contention that Bravo concealed interim earnings.[22]

Lastly Respondent attempted to prove that Bravo quit a permanent position with a Florida firm on April 21, 1987, and by so doing, terminated his right to backpay, at least as of that date. Bravo acknowledged at the hearing that he worked for Pritts for 3 weeks, but indicated that the job was not permanent. After the hearing, Respondent moved that a letter recently obtained from the manager of Pitts be admitted into evidence. I denied the motion and rejected the exhibit on the ground that the letter posed double hearsay problems. Respondent then moved for leave to take a telephone deposition of the Pitts foreman for whom Bravo had worked. By order of June 9, 1987, I denied Respondent's motion, explaining that such a procedure in which multiple parties would interrogate a witness who presumably spoke in Spanish with Bravo either directly or through an interpretor, would lead to confusion. I also suggested that a deposition of the foreman alone might not be dispositive. However, the order provided that on Respondent's request, I would reconvene the hearing to take oral testimony regarding Bravo's employment with Pritts. Respondent made no such request and I find no reason to reverse my prior rulings. Accordingly, the record contains no reliable evidence that Bravo rejected permanent employment with the Florida firm.

In light of all the above circumstances, I do not infer that Bravo engaged in willful deception; he simply was negligent in failing to maintain records which might have jogged his memory about the places he applied for employment.[23] See *Rainbow Coaches*, 280 NLRB 166 (1986). Instead, I find that Respondent has failed to prove affirmatively that job opportunities were available to Bravo or that he did not engage in a reasonably diligent search for interim employment. Accordingly, I conclude that both Bravo and Paredez are entitled to the sums set forth in the second amended backpay specification.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Del Rey Tortilleria, Inc., Chicago, Illiois, its officers, agents, successors, and assigns, shall

1. Pay to Nicholas Paredez (Gorgonia Hernandez) and Bernardo Bravo, the amounts set forth in the June 4, 1987 amendment to the amended backpay specification, plus interest, adjusted in accordance with the formula set forth therein, and make them whole for the entire backpay period from the date they were discharged on April 23, 1985, until the date on which the Respondent unconditionally offered them reinstatement, to be computed in the manner prescribed in *New*

[19] *M. J. McCarthy Motor Sales*, 147 NLRB 605, 615–618 (1964), a case cited by the Respondent, is distinguishable from the present case. There, the administrative law judge, with Board affirmance, denied backpay since credited, independent and substantial evidence proved beyond doubt that the claimant had deceptively concealed interim earnings.

[20] Respondent suggests that Bravo must have provided false documents to the INS when he applied for amnesty. Respondent forgets that Bravo testified at the instant hearing in May 1987 and applied for legalization in July 1988. He could have obtained new identification between those two dates. In any event, the decision of the INS to grant Bravo a working permit is presumptively valid on its face.

[21] Bravo refused to release only the 1040 tax form on which taxpayers itemize deductions. I hardly think this document was necessary or relevant to Respondent's inquiry.

[22] Respondent asserts that the IRS was unable to recover W–2 forms for Bravo because he suplied a false social security number. However, this assertion is dehors the record. Moreover, in a letter to me dated June 24, 1987, Respondent maintained that he was assured that the IRS could conduct a search even without a social security number.

[23] I note that Bravo's inability to recall the names of restaurants and ''ranches'' is entirely understandable.

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Horizons for the Retarded,[25] until payment of all backpay is made, less tax withholdings required by Federal and state laws.

2. Post at its Chicago, Illinois facility copies in both the Spanish and English language of an appropriate notice to employees.[26] Copies of the notice on forms provided by the Regional Director of Region 13, after being signed by the Respondent, shall be posted immediately on receipt thereof, and maintained for 60 consecutive days thereafter in consipicuous places, including all places where notices to employees are customarily posted. The Respondent shall take reasonable steps to ensure that the notice and its copies are not altered, defaced, or covered by any other material.

3. Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[25] 283 NLRB 1173 (1987). Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp*., 231 NLRB 651 (1977).

[26] Apart from the controversy over the remedy in this case, Respondent has agreed to the terms of the notice appended to the settlement stipulation approved by the Board on July 18, 1986. However, in light of this proceeding, the paragraph regarding reinstatement and backpay for employees Marcos and Hernandes may require amendment.